No. 18263

IN THE

United States Court of Appeals For the Ninth Circuit

STATE BOX COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal From the United States District Court for the Northern District of California, Northern Division

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BRIEF FOR THE UNITED STATES

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OPINION BELOW

The district court's memorandum opinion and findings of fact and conclusions of law appear at pages 46 and 79 of volume one of the reproduced record.

JURISDICTION

This is an appeal from a declaratory judgment obtained by the United States. The district court had jurisdiction under 28 U.S.C. sec. 1345. Its judgment was filed on August 7, 1962 (R. 89). Notice of appeal was filed on August 29, 1962 (R. 91). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether a federal statute granting timber on mineral lands to a railroad in 1862 required the grantee and its successors (here, State Box) to remove the timber within a reasonable time.

2. Whether the district court's finding and conclusion, supported by substantial evidence, that State Box and its predecessors failed to remove the timber within a reasonable time, can be set aside on State Box' appeal.

3. Whether State Box' claim to the timber, first asserted in 1958, is under the circumstances of this case barred by principles of adverse possession, abandonment, estoppel, and laches.

STATUTE INVOLVED

Section 3 of the Act of July 1, 1862, 12 Stat. 489, 492, provided:

> Section 3. And be it further enacted, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all mineral lands shall be excepted from the operation of this act; *but where the same shall contain*

timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company. (Emphasis supplied.)

STATEMENT

This action was instituted by the United States to obtain a declaration that it was the owner of timber previously sold by it and to quiet its title to the timber remaining on lands owned by it (R. I 1-4). The district court noted that the "parties are in general agreement as to the basic facts," which are elaborated in the memorandum opinion and findings of fact (R. I 46, 79). The facts may be summarized as follows:

Sections 3 and 9 of the Act of July 1, 1862, 12 Stat. 489, 492, 493-494, as amended by Section 4 of the Act of July 2, 1864, 13 Stat. 356, 358, granted the Central Pacific Railroad Co.[1] the timber on all alternate section "mineral lands" within ten miles of its right of way, the mineral lands themselves being excepted from the grant. The lands involved were withdrawn for national forest purposes in 1902, were never patented, and are now part of the Tahoe Forest Reserve (R. II 18, 34; Pl. Ex. 1, 2). The timber on that part of section 15 involved here was included in a timber con-

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[1] For ease of reference the several corporations involved will hereafter be referred to as follows: The Central Pacific Railroad Co.—"Central Pacific"; the Central Mill Co.—"Central Mill"; the Tahoe Sugar Pine Co.—"Tahoe Sugar"; the State Box Co.—"State Box"; the Grizzly Creek Lumber Co.—"Grizzly Creek."

veyance in 1906 by Central Pacific to two individuals. Other timber conveyances followed. Timber was removed by these early timber purchasers. (R. II 42-47, 49-51; Def. Ex. A-E.) By 1912, this timber interest had been acquired by Central Mill (Def. Ex. F). The lands were formally declared to be "mineral lands" by the Department of the Interior in 1925 (Pl. Ex. 3).

In 1932, Central Mill entered into a timber cutting agreement with another company; the timber involved here was not described (R. I 65-70, 83; R. II 72-73; Pl. Ex. 33). In 1937, the Forest Service advertised for bids on timber included on this part of section 15. By mutual agreement, the successful bidder, which was the same company Central Mill had contracted with in 1932, ceased its logging operations before this timber in section 15 was reached. (R. II 19-20; Pl. Ex. 17, 18.) In 1944, Central Mill was dissolved, its sole surviving stockholder being appellant, State Box. Central Mill purported to have distributed "its known assets" and conveyed to State Box title to all certain real property and interests in specific timber; the timber involved here in section 15 was not described. (R. I 16-17, 42-43; R. II 58, 65; Pl. Ex. 31, 32; Def. Ex. H, I, K.) Also in 1944, State Box purchased all of the outstanding stock of Tahoe Sugar and sold it to various individuals who were also officials of State Box (R. I 17-18, 43-44; R. II 74-75).

The Forest Service again advertised for bids on this timber in 1955 (R. II 29-30; Pl. Ex. 27). Grizzly Creek was the successful bidder and purchaser (Pl. Ex. 26), but it is to be noted that one of the unsuccessful bidders was Tahoe Sugar, controlled since 1944 by some of the officials of State Box (R. I 17-18, 43-44; R. II 29-30, 74-75; Pl. Ex. 26A). Grizzly Creek in 1955

cut and removed timber under its contract, for which the United States received $86,254.13 (R. II 38).

Neither State Box nor Central Mill ever paid taxes on this timber located on section 15 (R. I 17, 31, 37, 43; Pl. Ex. 29). Nor did either protest any sale or attempted sale by the Forest Service or removal of the timber by vendees of the Forest Service prior to 1958 (R. I 7, 17, 19, 43, 45). In early 1958, a title searcher informed State Box that "record title" to the timber was in Central Mill (R. I 19, 45). State Box asserted its claim for the first time in June 1958 by letter to the Forest Service (R. I 10; Def. Ex. O). In July 1958, two individuals, who had been officers of Central Mill when it was dissovled in 1944, executed a deed which purported to convey to State Box all of Central Mill's real property, including timber, but again this particular timber was not described (R. II 59; Def. Ex. J). The Forest Service rejected State Box' claim in November 1958 (Def. Ex. O).

State Box then filed three actions, (1) an action in tort in a state court against Grizzly Creek in 1959; (2) an action in 1960 against the United States in the Court of Claims for an alleged taking in 1955 of timber; and (3) an action in 1960 in the United States District Court for the District of Columbia seeking to enjoin the Secretary of Agriculture from selling or removing remaining timber (R. II 10; Pl. Ex. 9, 9A, 9B, 9C, 10). Those three actions have been and are being held in abeyance pending decision of this suit, which was instituted in the court below by the United States.

The district court's memorandum and order were entered in May 1962, after trial before the court without a jury (R. I 46). Thereafter, in August 1962, findings of fact and conclusions of law were filed (R.

I 79), and judgment was entered for the United States (R. I 89).[2] This appeal by State Box followed.

SUMMARY OF ARGUMENT

The 1862 Act, as construed by the courts, and related statutes support the view that State Box and its predecessors did not receive, and Congress did not intend for them to receive, a grant in perpetuity as to timber on "mineral lands." Of course the federal grant is to be construed strictly against the grantee so as to withhold that which is not expressly granted. So far as possible, statutes should be construed to reconcile rather than to create conflicting rights. And the construction of the federal grant of real property interests in several states is manifestly a matter of federal law. (We question whether even California law would permit a result which would fetter real property interests indefinitely.)

The common law rule requires the removal of timber within a reasonable time where the conveyance is silent as to time. The district court found that State Box and its predecessors failed to remove the timber within a reasonable time. That finding is supported by substantial evidence and is unchallenged by State Box. The facts of this case also show that State Box' claim is barred by principles of adverse possession, abandonment, estoppel, and laches.

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[2] State Box' counterclaim for recovery of the proceeds of the 1955 timber sale was opposed by the United States (R.I 11, 14). State Box ultimately conceded that the district court "does not have jurisdiction to render the affirmative money judgment sought by the counterclaim" (Def. Trial Br., p. 17, filed November 13, 1961). The district court stated that it need not consider the counterclaim, but its holding on the Government's case, we believe, effectively and correctly disposed of the counterclaim (R.I 62). *United States* v. *Shaw*, 309 U.S. 495, 502-505 (1940).

ARGUMENT

I

Title to the Timber Sold in 1955 and Also to the Timber Remaining on the Land Involved Was Correctly Quieted in the United States

A. *The statute did not grant to State Box or its predcessors a perpetual estate in the timber.*—It is settled law that federal grants are to be construed strictly against the grantee so as to withhold that which is not expressly granted. As stated in *Caldwell* v. *United States,* 250 U.S. 14, 20 (1919), "statutes granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that such grants must be construed favorably to the Government and that nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the Government." See also *United States* v. *Union Pacific R. Co.,* 353 U.S. 112, 116 (1957); *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262, 272 (1942); *United States* v. *Oregon and California R. Co.,* 164 U.S. 526, 539 (1896).

It is also clear that, under a conveyance of timber silent as to time, the common law rule requires the removal of the timber within a reasonable time. The principle is stated in 2 Tiffany, *The Law of Real Property* (3d ed. 1939) sec. 597, p. 537, as follows:

> Even in the absence of an express limitation as to the time of cutting and removal, the courts, moved by a desire to prevent the operation of a mere conveyance of trees as in effect a conveyance of the soil on which the trees are growing, tend to imply a requirement that the trees shall be cut and removed within a reasonable time, with a resulting loss of all right to trees not removed within such time.

See *United States* v. *Wheeler,* 161 F. Supp. 193, 197-198 (W.D. Ark. 1958). Directly in point is the ruling in *United States* v. *Power* (N.D. Cal., No. 13713, 1909) unreported (Pl. Ex. 30, p. 4):

> 2. The act making the grant to the Central Pacific Railroad Company contains the proviso; "Provided that all mineral land shall be excepted from the operations of this act, but where the same contains timber, the timber thereon is hereby granted to said company." If, therefore, the land, described in the complaint, is mineral land, as claimed by the plaintiff, then the defendant, as successor in interest of the Central Pacific Railroad Company, had the right to remove the timber thereon unless such right had been forfeited. There is no time specified in the act within which the grantee was required to remove such timber, and the general rule, as applied to grants of that character, as between private persons, is that the grantee has a reasonable time within which to remove the same [citations omitted].
>
> I am of the opinion that the same rule is applicable to the grant under which the defendant claims. * * *

The purpose of the 1862 Act was to aid the railroads in the construction and operation of their lines. *United States* v. *Union Pacific R.R. Co.,* 91 U.S. 72, 79-82 (1875). There is, however, no affirmative expression in the statute of a congressional intent to grant timber on mineral lands *in perpetuity*[3] and the

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[3] The use of a form of the word "grant" does not, of course, mean that a grant *in perpetuity* was intended. Though the word "grant" or a form of it is commonly used in timber conveyances, the common law requires removal within a reasonable time. See, e.g., *R.F.C.* v. *Sun Lumber Co.*, 126 F.2d 731 (C.A. 4, 1942); *Thomas* v. *Gates,* 31 F.2d 828 (C.A. 4, 1929), cert. den., 280 U.S.

legislative history of the statutory language concerning timber is not enlightening on the question.[4] In this situation it must be assumed, we submit, that Congress was aware of the common law rule which requires the removal of timber within a reasonable time and intended the grant of timber on mineral lands to end when the purpose of the statute was accomplished.

Other provisions of the relevant statutes indicate that it was understood that the grants were made to realize the fulfillment of the purpose within a reasonable time in the future and that no permanent interest in timber was intended. For example, Section 3 of the 1862 Act provided that the railroad was to sell all of its land grant within three years, "after the entire road shall have been completed,"[5] failing which the United States could sell such land itself for the benefit

559 (a diversity case, properly applying state law, in which neither the United States nor a federal grant was involved); *Tennessee Mining & Mfg. Co.* v. *New River Lumber Co.*, 5 F.2d 559 (C.A. 6, 1925); *Granville Lumber Co.* v. *Atkinson*, 234 Fed. 424 (E.D. N.C. 1916). *Carr* v. *Central Pacific R. Co.*, 55 Cal. 192 (1880), cited by State Box (Br. 14), merely determined that as between the railroad and a subsequent mineral patentee, the railroad had title to the timber. This 1880 four-line opinion does not decide that a perpetual estate in the timber was intended by the 1862 statute as against the United States.

[4] The provision concerning timber was not in the original House bill, H.R. No. 364. Senator Wilson of Massachusetts proposed the provision on the floor of the Senate as an amendment. He said: "I will simply say in support of the amendment that one of the great difficulties of constructing and running a Pacific railroad will be the want of timber, and, therefore, as these lands are covered with timber, I hope this amendment will be adopted. It will be for the interests of the country." The amendment was routinely adopted by both houses without debate and was considered by the House as one of several immaterial Senate amendments. Cong. Globe, 37th Cong., 2d Sess. 2813, 2905 (1862).

[5] In 1862, it would have been absurd for Congress to attempt to predict the time of completion of the railroad.

of the railroad. Similarly, Section 4 of the 1862 Act provided for the issuance of patents conveying the title to granted lands to the railroad upon completion of each 40 consecutive miles of road. (Section 6 of the 1864 Act reduced the requirement to each 20 consecutive miles.) A patent, or a clear listing, is the indicium of a permanent interest and the basis of any chain of title. But no provision was made for the patenting or clear listing of timber on mineral lands. Section 5 of the 1864 Act extended by one year certain time limits imposed on the railroads, and required Central Pacific "to complete twenty-five miles of their said road in each year thereafter, and the whole to the state line within four years * * *."

Only a few years later, in enacting the first mining law permitting the patenting of mineral lands, Congress made no special exception as to prior grants of timber on mineral lands and did not reserve timber granted to a railroad from the patent. Act of July 26, 1866, 14 Stat. 251, as amended by the Act of May 10, 1872, 17 Stat. 92, 30 U.S.C. sec. 29. Also noteworthy is the fact that Section 21 of the 1864 Act required payment of the costs of surveying "before any land granted by this act shall be conveyed to any company or party entitled thereto under the act." This particular area was surveyed as early as 1874, but no surveying costs as to section 15, the land on which the timber involved here is located, were ever paid by the railroad.

To a degree there is a conflict of rights between the mineral reservation and the timber grant to the railroad. Congress made effective the mineral reservation by providing for mining development and possible fee patents under the mining laws. Ordinarily a min-

ing locator is entitled to use the timber on his location for mining purposes and secures complete title to the timber when he qualifies for his fee patent.[6] *United States* v. *Etcheverry,* 230 F. 2d 193 (C.A. 10, 1956), and cases there cited. Timber ownership by the railroad is thus inconsistent with the mining locator's rights. While the railroad prevails over any mineral locator during construction of the road, no reason appears why that conflict should be extended in perpetuity. Reconciliation of the two rights so far as possible requires, we submit, that the railroad, or its successors, exercise its rights within a reasonable time.

Moreover, in *United States* v. *Union Pacific R. Co.,* 353 U.S. 112, 117, 120 (1957), the Supreme Court construed the reservation of "mineral lands" in one section of the 1862 Act to apply to mineral rights in the right-of-way granted in another section of the statute. The Supreme Court would not "assume that the Thirty-seventh Congress was profligate in the face of its express purpose to reserve mineral lands" and "would [not] make a violent break with history * * * [by construing] the Act of 1862 to give such a bounty" as against the United States. So, here, this Court should not construe the grant of timber, for the purpose of aiding in the construction and operation of railroads, to give a bounty as against the United States in favor of State Box, a company not engaged in railroad enterprises, more than 100 years after the enactment of the statute, for a use totally unrelated to the purpose of the 1862 Act.

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[6] In 1955 Congress amended the mining laws for the purpose of assuring that removal of timber by mining locators is to be for use for mining purposes. Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. sec. 612.

B. *Application of state law in construing the federal timber grant and in determining the estate granted was properly rejected.*—In its memorandum opinion, the district court said (R. I 54-55):

> It is apparent that, when dealing with a United States statute which affects real property in numerous States, the law of the United States alone must control the disposition of title to its lands [citations omitted]. The disposition of such lands is a matter of the intention of the grantor, the United States.
>
> The policy set forth in *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 [1943], is here applicable, namely that in the absence of a specific statutory provision, the application of state law is denied where it would make identical transactions subject to the vagaries of the laws of the several states. The construction of grants by the United States is a federal, not a state question, and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyance [citations omitted].

It is submitted that the district court's conclusion is eminently correct. The applicable rule was thus stated in *United States* v. *Oregon,* 295 U.S. 1, 28 (1935):

> The construction of grants by the United States is a federal not a state question, [citations omitted] and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances. * * *

See also *Borax, Ltd.* v. *Los Angeles,* 296 U.S. 10, 22 (1935); *Chapman & Dewey* v. *St. Francis,* 232 U.S. 186, 196 (1914). Moreover, the Supreme Court has construed these same statutes twice recently with no mention of the relevance of state law. *United States* v. *Union Pacific R. Co.,* 353 U.S. 112 (1957); *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262 (1942).

State Box contends that, under California law, since forfeitures are abhorred, a timber conveyance silent as to time does not require removal of the timber within a reasonable time (Br. 15-17). Indeed, it would construe the grant as imposing no obligation to remove the timber "within ten years or twenty years or fifty years or one hundred years * * *" (Br. 11). It is significant, we submit, that State Box cites no California case which decides that a timber conveyance silent as to time does not obligate the *grantee* to remove the timber within a reasonable time. Moreover, we question whether the California rule would embrace a construction that would allow a timber grantee to tie up the land indefinitely, "for a period which could not be measured, or, perhaps for all time * * * [i]n the absence of language in the contract plainly and unequivocally disclosing such intent * * *." *Woodard* v. *Glenwood Lumber Co.,* 171 Cal. 513, 522, 153 Pac. 951, 955 (1915); see also *United States* v. *Power* (N.D. Cal., No. 13713, 1909) unreported (Pl. Ex. 30, p. 4); *Mallett* v. *Doherty,* 180 Cal. 225, 180 Pac. 531 (1919); *Call* v. *Jenner Lumber Co.,* 33 Cal. App. 310, 165 Pac. 23 (1917). But if appellant is right as to California law, we submit that it would be absurd so to apply the grant in California when the same words, as appellant admits (Br. 21), also grant lands and rights in "Nebraska, Wyoming, Utah and Nevada * * *."

In this connection, State Box refers to *United States* v. *Waldron* (N.D. Cal., No. 6105, 1949) unreported. As the district court here observed (R. I 51, 85), it had not been established on the facts of that case that Waldron had had a reasonable time to remove the timber. Taking judicial notice of the *Waldron* records and noting that State Box was a party to the *Waldron* case (R. I 51, 85), the district court here stated (R. I 57-58; emphasis by the court):

> Defendant [State Box] can gain no comfort from *United States vs. Waldron,* No. 6105, records of this Court. There is language in that case, to be sure, that the rule of *Gibbs vs. Peterson,* 163 Cal. 758, was to be applied. But the results of the *Waldron* case were that additional time was given the defendants to exercise their rights of cutting timber (along with a finding that a reasonable time had *not* passed during which the timber should have been cut). Later, on March 30, 1953, a final decree was entered in the case adjudging that the defendants had exercised their rights of cutting timber, that they no longer had any right, title or interest in such timber, *and that the Government was then the legal owner of all remaining timber* on said land. In other words, the reference to *Gibbs vs. Peterson* was specifically for the purpose of framing an order allowing the Waldrons to continue cutting on the land involved for a specified time, after which time the timber would revert back to the Government.

The case thus stands for the proposition that the timber grant was not a perpetual one.

C. *The finding that State Box and its predecessors failed to remove the timber within a reasonable time is supported by substantial evidence.*—In this case, the

district court found that State Box "and its predecessors in title did not remove the timber from section 15 within a reasonable time although opportunity to do so existed" (R. I 85). That finding is supported by substantial evidence. We do not know whether the railroad could have removed the timber in the 1880s, but the evidence adduced did show that by 1902, there was definite lumbering activity in the area and adequate road facilities to reach section 15, to remove the timber to nearby mills, and to take the finished product to market (R. II 43-47, 49-50). There was a demand for timber at that time for the construction of large flumes in the nearby Bowman Lake area and for mining purposes (R. II 44-45, 47). There was also some demand for building purposes (R. II 48). A mill was constructed within three miles of section 15 and there was easy access to that mill from section 15 (R. II 43-44). Of course the railroad was only ten miles away. Further, the United States sold some of this and other timber in the area in 1937 (R. II 19-20), and, beginning in 1945, the United States made numerous timber sales on adjoining sections, which sales were completed and stipulated by State Box at the trial (R. II 21-22, 24, 32-33; Pl. Ex. 19). Following World War II, there was an increased demand for timber (R. II 26-27). Much of the timber on the patented mining claims in section 15 had been cut and removed prior to 1953 (R. II 25, 50-51). Grizzly Creek cut and removed timber under its contract in 1955 (R. II 31, 38). Access roads were also available during the period of these later sales (R. II 22-25, 31).

State Box does not contend that the evidence does not support the district court's finding. It therefore concedes the point, and the federal appellate courts do

not retry facts and will not set aside findings supported by substantial evidence, which here consisted of "admitted facts" and testimony at the trial. It is "the immemorial canon that, given substantial evidence to support its judgment, the trial court must have its way." *Coleman Co.* v. *Holly Mfg. Co.,* 269 F. 2d 660, 661, 665 (C.A. 9, 1959). See also *Lowe* v. *McDonald,* 221 F. 2d 228, 230 (C.A. 9, 1955); *Wittmayer* v. *United States,* 118 F. 2d 808, 809-811 (C.A. 9, 1941).

II

State Box' Claim Is Barred By Principles of Adverse Possession, Abandonment, Estoppel, and Laches

Preliminary to reciting additional facts which buttress the district court's result, we advance several germane principles. Under California law, the statutory period of adverse possession is five years. Cal. Code Civ. Proc., secs. 318, 322.[7] "The right to standing timber may be acquired by adverse possession." 2 Tiffany, *The Law of Real Property* (3d ed. 1939) sec. 595, p. 533; see *Red River Lumber Co.* v. *Null,* 66 Cal. App. 499, 505-506, 226 Pac. 812, 814-815 (1924). Further, a timber right may be lost by abandonment. In determining whether such a right has been abandoned, the grantee's nonpayment of taxes and failure to cut and remove the timber are given great weight. The timber reverts to the owner of the fee upon establishment of abandonment. *United States* v. *Wheeler,* 161 F. Supp. 193, 198 (W.D. Ark. 1958). Also, a party will be estopped to claim title when others have relied

[7] There is no inconsistency between reference by the United States to state law in this phase of the case and its insistence that the title granted by it under the federal statute is to be determined by federal law.

upon his action or inaction. See *First National Bank of Portland* v. *Dudley,* 231 F. 2d 396, 400-401 (C.A. 9, 1956); *James* v. *Nelson,* 90 F. 2d 910, 917-918 (C.A. 9, 1937), cert. den., 302 U.S. 721. The doctrine is available to a plaintiff in a case where a defendant claims title. *Wehrman* v. *Conklin,* 155 U.S. 314, 332-333 (1894); *George* v. *Tate,* 102 U.S. 564, 568 (1880); cf. *Albert* v. *Joralemon,* 271 F. 2d 236, 240-241 (C.A. 9, 1959). And laches, a principle involving only the passage of time, operates to prevent a party, who has slept on his rights, from complaining of the loss of those rights. *Russell* v. *Todd,* 309 U.S. 280, 287-289 (1940). It applies to suits concerning interests in real property, *Abraham* v. *Ordway,* 158 U.S. 416, 422 (1895); *Godden* v. *Kimmel,* 99 U.S. 201-202, 208-212 (1878), and may be asserted by a plaintiff. *Adair* v. *Shallenberger,* 119 F. 2d 1017, 1020 (C.A. 7, 1941).[8]

In this case, the facts show that whatever interest State Box and its predecessors may have once had in the timber had been lost long before 1955 when the United States and Grizzly Creek contracted for the sale of some of the timber. Those facts may be particularized as follows:

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[8] It was stated in *Northern Pacific R. Co.* v. *United States,* 277 F.2d 615, 624-625 (C.A. 10, 1960), that the plaintiff, the United States, could not invoke laches "to bar rights asserted by defendant merely by way of defense" because the defendant's counterclaim had been dismissed earlier in the proceedings and because of the immunity of the United States. We believe that holding to be erroneous. *Stanley* v. *Schwalby,* 147 U.S. 508, 517 (1893). We further believe, as the cases cited above hold, that estoppel and laches can be relied on by a plaintiff. Moreover, the Tenth Circuit's holding is clearly irrelevant to the case at bar in the light of State Box' counterclaim for title which was not dismissed earlier in the proceedings (R. 6-11) and the availability of relief against the United States in the Court of Claims. *Malone* v. *Bowdoin,* 369 U.S. 643, 647, note 8 (1962).

1. Central Pacific never pretended to have acquired more than an interest in timber on the lands involved. It paid no surveying costs, as required by statute, though the area was surveyed as early as 1874. Neither Central Pacific nor any of the subsequent grantors ever conveyed an interest other than an interest in timber, even before the lands were formally declared to be "mineral lands" in 1925. The timber involved has never been described in a conveyance of any kind since 1912, when various individuals conveyed this and other timber to Central Mill (Def. Ex. F, G).

2. The lands were withdrawn for national forest purposes in 1902 and were placed within the Tahoe Forest Reserve in 1906. The lands have been administered as part of the Tahoe National Forest and the timber has been given fire protection and care by the United States, which has exercised possessory rights to the timber for at least 20 years (R. II 18-19).

3. The timber involved was not described by Central Mill in its 1932 timber contract with another company, although that contract, as found by the district court without challenge by State Box, described all other timber it had received in 1912 (R. I 65-70, 83; R. II 72-73; Pl. Ex. 33).

4. In 1937, the Forest Service advertised for bids on timber included on this part of section 15. The successful bidder was the same company Central Mill had contracted with in 1932. Central Mill lodged no protest to the sale (R. II 19-20; Pl. Ex. 17, 18).

5. Section 321 of the Transportation Act of 1940, 54 Stat. 954-955, 49 U.S.C. sec. 65(b), provides that upon the filing of a waiver to its remaining land grant

claims, including "interests in lands," a railroad would not be required to give special rates to the United States. Such interests previously patented to a railroad or sold by a railroad to an innocent purchaser for value were excluded. Regulations relating to this Act required a railroad to list all such interests previously conveyed. 43 C.F.R. 273.65 (1944 Cum. Supp.); 43 C.F.R. 273.68 (1954 ed.). In October 1940, the Southern Pacific Co., on behalf of Central Pacific, filed a release. It made no references to any conveyances affecting this particular land (Pl. Ex. 4-8).

6. In 1944, when Central Mill was dissolved, it purported to have distributed "its known assets" and conveyed to State Box, its sole surviving shareholder, title to all certain real property and interests in specific timber; it did not describe this timber on section 15 (R. I 16-17, 42-43; R. II 58, 65; Pl. Ex. 31, 32; Def. Ex. H, I, K).

7. Following *United States* v. *Waldron* (N.D. Cal., No. 6105, 1949), unreported, the United States entered into agreements with a number of similarly situated timber claimants, including State Box and Tahoe Sugar (Pl. Ex. 20-25), under which timber was to be removed within a reasonable time and a quitclaim deed executed to the United States. State Box never requested such an agreement as to this timber, and admits that it did not even know that it might have a claim until 1958 (R. I 10, 19, 45; Def. Ex. O).[9]

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[9] *Waldron* is distinguishable on several grounds. First, the conveyance to Waldron's predecessors in interest was directed to the attention of the United States in 1945 (Pl. Ex. 7, 8). Second, Waldron paid taxes continuously from 1903 and from 1924 to 1937 paid a fire protection tax to the Forest Service. Third, the evidence in this case relating to early timber operations and markets

8. Neither State Box nor Central Mill ever paid taxes on this timber or paid for its protection and care (Cal. Rev. & Tax Code, secs. 104, 107; R. I 17, 31, 37, 43; R. II 18-19; Pl. Ex. 29).

9. Neither Central Mill nor State Box ever protested a sale by the Forest Service or removal by vendees of the Forest Service prior to 1958 (R. I 7, 17, 19, 43, 45).[10]

10. Tahoe Sugar, controlled since 1944 by some of the officials of State Box, was one of the unsuccessful bidders at the advertised sale of some of this timber to Grizzly Creek in 1955 (R. I 17-18, 43-44; R. II 29-30, 74-75; Pl. Ex. 26A).

These facts, we believe, support a denial of State Box' claim under the principles of adverse possession, abandonment, estoppel, and laches.

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is entirely different. Fourth, since 1949, a particularly good lumber market has existed, there have been large-scale timber operations in the area, and the road referred to in the *Waldron* Finding V has been in continuous existence (State Box App. iv). Finally, the district court found that Waldron "had consistently asserted title" to the timber involved in that case (R.I 85). That finding is unchallenged by State Box.

[10] State Box curiously urges, "Ever since the acquisition of title by The Central Pacific Railroad, the ownership of the timber by the railroad and its successors has been readily apparent from an examination of the official records * * * " (Br. 25). Even if that were so, it would only operate to demonstrate the laches of State Box and its predecessors. The record is plain that this claim is an afterthought as a result of a title examiner's report without regard to any of the above-recited facts.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully,

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Certificate of Examination of Rules

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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